IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHIN HING, *Appellant,*

vs.

HENRY M. WHITE, as Commissioner of Immigration, at the Port of Seattle, Washington, for the United States Government, *Appellee.*

No. 2651.

IN RE THE APPLICATION OF CHIN HING FOR WRIT OF HABEAS CORPUS.

Argument and Brief in Support of Petition for Rehearing

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ARGUMENT.

The filing of this petition for a rehearing of the cause involved herein is based upon the assumption that, when a cause, of whatsoever nature it may be, is brought before this Honorable Court in due form

and in accordance with the Rules in such case made and provided, the party so bringing such cause upon appeal from the court below, is entitled to have the various issues involved in such cause considered upon merit, and to have a ruling made and rendered by this Honorable Court that will, so far as may lie within the power and jurisdiction of said Court, quiet the said issues thus brought for adjudication, and that said issues and each of them may thus be quieted.

In this respect the Court has erred, in that the various issues presented to the Court for adjudication in this cause were not considered upon merit, nor were they quieted to the extent of the Court's power and jurisdiction by its order and decree made and rendered in said cause on the 7th day of August, 1916, as will be hereinafter shown.

On p. 2 of said Opinion, the Court says:

> "Conceding the facts so alleged to be true, and conceding the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances stated, the manifest legal result is that the appeal remained pending before the Secretary of Labor

and undisposed of. *In re Wai Tai,* 96 Fed. 484."

The Court, therefore, concedes the lack of authority of the Solicitor of the Department of Labor to act in the case. The Court further concedes, as a logical conclusion to be drawn from the facts, that the "manifest legal result is that the appeal remained pending before the Secretary of Labor and undisposed of." So far as this concession goes, it leaves nothing to be desired, for it is strictly in accordance with the facts in the case. But it does not go far enough, and therein lies the error attributed to the Court in thus stopping short of the logical conclusion indicated in the said concession.

If the Solicitor of the Department of Labor had no legal authority empowering him to consider said case and render an opinion thereon, having proceeded to consider said case and render an opinion thereon notwithstanding the lack of legal authority so to do, it is a self-evident fact that the consideration of said case by said Solicitor of the Department of Labor, and the opinion rendered thereon by him as a result of such consideration, are illegal and constitute a nullity. This results,

as the Court has conceded, in a condition under which the appeal remained pending before the Secretary of Labor and undisposed of.

But, if the opinion rendered by the said Solicitor of the Department of Labor as a result of his consideration of said case be conceded to be illegal when it was rendered (September 25, 1914), then it must be admitted that said illegal opinion was equally illegal at the time of its approval by the Secretary of Labor (November 13, 1914), and that, under the circumstances of the case, no amount of subsequent approval by the Secretary of Labor could alter its illegality.

The record establishes the fact that the Secretary of Labor did not personally take up and affirm the Order of the Commissioner, but did take up and affirm the illegal and unauthorized opinion of the said Solicitor of the Department of Labor. Within the premises, therefore, and under the circumstances of the case, as they exist and did exist at the time in question, the act of the Secretary of Labor has failed to clothe with legality the illegal act of his subordinate, and the appeal of the appellant in this cause has not, therefore, been legally

acted upon by the one official having the legal authority to consider the case and render an opinion thereon.

In view of this condition of things, appellant in this cause contends that the issues brought before this Honorable Court in this respect, not having been quieted by the Opinion of said Court, are still open issues subject to judicial determination, and that, therefore, he is entitled to a rehearing on said cause.

Had the Solicitor of the Department of Labor had before him at the time he rendered his admittedly erroneous opinion in said case, the original record of the case, which is the only foundation upon which he could base a legal opinion, there would have been some chance for this Honorable Court to accuse appellant of finely drawn technical reasoning in claiming that the subsequent adoption by the Secretary of Labor of the erroneous opinion of the said Solicitor of the Department of Labor failed to make of it a legal opinion. But the truth of the matter precludes this; for neither the Solicitor of the Department of Labor nor the Secretary of Labor had in their possession said original record of the case at the time in question.

At the time the Solicitor of the Department of Labor took up the case for consideration and rendered said erroneous opinion, the original record of the case was before the Honorable Jeremiah Neterer, in the city of Seattle, and he had issued no order giving the Secretary of Labor or any subordinate of said Secretary the right to remove the said records. Therefore, the opinion of the said Solicitor of the Department of Labor was, aside from the question of lack of authority to consider the case in the first place, a matter wholly and entirely outside the record.

The Secretary of Labor did not have before him the original record of the case, but adopted and affirmed the erroneous finding of his subordinate, which finding was wholly outside the record. Therefore the final opinion is also a matter outside the record, and appellant's detention based upon such opinion is illegal and not in accordance with "due process of law."

Unfairness can never be harmonized with justice. An alien who seeks admission to this country and is denied such admission, and feels that he has been unjustly discriminated against in that the

law has been misinterpreted to his detriment, or that he has been deprived of his rights under the law, and raises the issue of personal rights under due process of law in a court of justice, is entitled to just as much nicety of judgment in the determination of his cause as is the citizen of the United States who raises an issue of personal rights under the supreme law of the land in the same court.

Appellant contended, in his amended petition for the writ of habeas corpus, that he had not a fair and impartial trial before the Inspector in charge of Immigration in Seattle, washington, and that there was no evidence in the record to sustain the Department's exclusion and deportation order. The Respondent replied, denying this contention. Here was raised an issue for this Honorable Court to determine, that appellant was entitled to have determined, but which this Court failed, neglected, or refused to consider and rule upon.

The issues brought to this Court for adjudication are based upon the record of the case, and the Court's determination of said issues must, of necessity, be based upon the same foundation. One of the contentions made by appellant was that "there

is no evidence in the records to sustain the Department's Exclusion and Deportation Order." This contention, evidently, found no place in the consideration of the Court, and no reference was made to it in the Opinion of said Court. This constitutes a denial of a right of which appellant cannot legally be deprived. The contention made does not depend upon judicial opinion as to the veracity of appellant, but rests upon the claim that the record of the case lacks certain essential evidence to support a certain ruling. Therefore, the contention becomes an issue to be judicially determined upon the record that has thus been called into question. This the Court has thus far failed to determine.

Taking up the question as to the allegation of unfair hearing, we contend that there was no evidence upon which the Government, the Commissioner, Acting Secretary, Secretary, or any Chinese Inspector could make a finding:

First: That Chin Shew was not a merchant.

Second: That Chin Hing, the applicant and appellant, was not a minor son of said Chin Shew, a merchant of New York City, and that he should not be admitted.

The law has been well settled, as stated by this Court, in many decisions, and by the Supreme Court in the cases—

Chin Yow vs. U. S., 208 U. S. 8;
United States vs. Ju Toy, 198 U. S. 253;
Tang Tun vs. Edsel, 223 U. S. 673.

That the decision of the Department is final, but that is on the presupposition that the decision was after hearing in good faith, however summary in form, and based upon evidence.

We, therefore, represent to this Court that the record in this case comes within the purview of the rule of law laid down by this Court, and by the Supreme Court in the cases cited, to-wit, that the action of the executive officers was such as to prevent fair investigation; that there was manifest abuse of the discretion committed to them by the statute; that the proceedings were manifestly unfair, showed the prejudice of the examining inspector, and that there was no evidence upon which to base such findings and order of deportation.

Take the first issue:

The Status of the Father: The record shows

that Chin Shaw was a bona fide member of the mercantile firm of Quong Wo Chong Company, doing business of buying and selling merchandise in the City of New York (Record, pp. 58-60). The report of the Chinese Inspector in charge, Albert E. Wiley, of New York City (as shown by Record pp. 67 and 68), gives credit to the alleged father and the identifying witnesses and among other things states, as follows:

> "THE STATUTORY WITNESSES ARE REPUTABLE BUSINESS MEN AND HAVE GAINED THEIR KNOWLEDGE OF THE MERCANTILE STATUS OF CHIN SHEW THROUGH BUSINESS RELATIONS WITH HIM AS A MEMBER OF THE FIRM, AND I MIGHT ALSO STATE THAT CHIN SHEW IS KNOWN TO BE ACTIVELY ENGAGED N THIS STORE.
>
> The alleged father, and witness, Fong Goon Moon, testified in an unhesitating manner and impressed me that they were telling the truth. No material discrepancies appeared in their statements.'
>
> ALBERT E. WILEY,
> Chinese Inspector."

Here is a letter showing personal knowledge of

the inspector who saw the witnesses, interviewed them, and gives his personal opinion.

We wish also to impress upon this honorable Court that the Government offered no testimony to rebut the evidence of the status of the father as a merchant, and the Court understands that the Chinese Exclusion laws are to exclude Chinese laborers, and not those of the exempt classes, who by law, are admitted, upon proof being made.

The evidence of the issue of relationship consists of the statements of Chin Shew, and the Chinese witness, as well as the statement of the applicant himself.

In the digest of the evidence made by the Commissioner at Washington (Record pp. 48-51), on page 49, great stress is laid on the fact that there is discrepancy in the testimony of the applicant and his father in respect to the paternal father; "the applicant having stated, in fact, that this relative is dead, and he had never seen him; and the alleged father having stated that his father died at his home in 1900, which would be within the memory of the applicant."

It seems to us that there is no ground for reaching this conclusion, that the boy is not the son of Chin Shew, because he cannot recollect, within his memory, the appearance of his father's father; that the said boy was of the tender age of five years, and we venture that the members of this court would have, if any recollection, only a hazy one, of the appearance of their paternal parents, if that impression was cut off at the age of five years.

It does not seem that the Immigration law was intended to give to the Immigration Department the power to separate children and parents, based upon such conclusions as we find in this case, as shown by the record. We would like to ask this honorable Court to read the examination of the applicant (Record pp. 60-67), the examination of Chin Shew, the father (Record pp. 69-88), and Your Honors, we are certain, will then come to the conclusion that there is no evidence upon which to base the finding that the applicant was not the minor son of his father, Chin Shew, a merchant of New York City.

Taking up that the contention that the memorandum for the Acting Secretary, included in said

Record, as shown by Report of Inspector Mangels to the Commissioner of Immigration (Record pp. 89-91), was an irregular, improper and illegal addition, and was not evidence, was not given under oath, as shown by the record, and should not have been made a part of the record; we will ask Your Honors to look on Record page 90 of said report, wherein the Inspector, without notice to applicant, without giving him a chance to examine said record, or be apprised of the fact that reference was being made to it to bear out the Department's contention that the applicant was not entitled to admission, sets up excerpts from a case therein, stated as the Chin Quong case, and quotes from said case half a dozen times. The same inspector, in the examination of the applicant (pp. 87 and 88), instead of trying to bring out the testimony in a fair and impartial manner, tried to mix up his questions to the applicant in such a way as to catch him, and showed plainly his unfairness.

It seems to us that under the rule of fairness, even though the power be given to inspectors to summarily examine and decide on a case, that any rule of reason and fairness would require that any

evidence upon which the Department would base a finding, be given under oath, and any record in any case, outside of the case then being passed upon, the applicant should be apprised of said record and given a chance, on his own behalf, to meet the allegations of the Department, as shown by the record which they examined, but which the applicant had no knowledge of.

AUTHORITIES.

It was said in *U. S. vs. Quan Wah* (D. C.), 214 Fed. 462:

> "Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained."

Immigration officers cannot act arbitrarily in refusing to believe persons sought to be deported or his witnesses.

U. S. vs. Lee Chung, 206 Fed. 367;

In re. Jew Wong Fay, 91 Fed. 240;

Wong Chung vs. U. S., 170 Fed. 182; 95 C. C. A., 198;

U. S. vs. Loung San et al., 114 Fed. 702;

U. S. vs. Lee Huen, 118 Fed. 457.

It is not sufficient to raise a doubt.

U. S. vs. Hong Lin, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence, *ex parte, Yah Ucaina,* 199 Fed. 885.

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not a judicial capacity, and must follow definite standards, and apply general rules.

U. S. vs. Uhl, 213 Fed. 152.

Congress has seen fit to base the final decision as to the rights of aliens to enter the country in the Department of Commerce and Labor, but that Department is governed by certain rules and regulations, which must be *strictly construed* in conformity with the *eternal principles of justice and right.*

It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal.

U. S. vs. Redfern, 180 Fed. 500.

In the case of *U. S. vs. Williams,* 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

> "It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the

prosecution. He is held in seclusion and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer, who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED INVALID."

Where, by the abuse of the discretion or the arbitrary action of the inspector or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or about to be deported, the power is conferred, and the duty is imposed upon the courts of the United States to issue a writ of habeas corpus and relieve him.

Chin Yow vs. U. S., 208, p. 8;
Low Wah Suey vs. Backus, 225 U. S. 460.

That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the

accused from procuring witnesses or evidence or counsel he desires.

U. S. vs. Sibray, C. C., 178 Fed. 144;

U. S. vs. Williams, D. C., 185 Fed. 598;

Roux vs. Commissioner of Immigration, 203 Fed. 413; 212 C. C. A. 523.

The law is now well settled that no alien can be deported upon mere suspicion, rumors, "repute," information and belief, hearsay statements, reports and letters of a secret nature, not sworn to and without the benefit of cross-examination.

Appellant was entitled to have his cause reviewed by the Secretary of Labor directly, and upon the original record of the case, without the intermediary of the Solicitor of the Department of Labor. The cause was not so determined by the Secretary of Labor direct, nor did the original record of the case play any part in the review granted the cause.

The Court erred in holding that appellant was not entitled to have his counsel appear before the Commissioner General of Immigration, for the purpose of placing before that official further evidence in the case and orally arguing the appeal.

In the rules governing the admission of Chinese, Rule 5 provides:

> "If upon the conclusion of the hearing the Chinese applicant is adjudged to be inadmissible, he shall be advised of his right to appeal to the Secretary of Labor by a notice in the Chinese language. If the rejected applicant elects to appeal, written notice thereof must be served on the officer in charge within five days, exclusive of Sundays, and legal holidays, after rejection."

Subdivision B, of the rule, provides:

> "Applicant's counsel shall be permitted, *after notice of appeal has been duly filed, to examine the record* upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein."

If appellant had the right to have counsel after he had filed his notice of appeal, and if appellant's counsel had the right to examine the records upon which the excluding decision is passed, appellant then, in analogy, at least, had the right to have his counsel point out to the appellate officer the inaccuracies appearing therefrom. There is no provision in the rules to the effect that appellant's counsel cannot be orally before the Secretary of

Labor, in order to point out the errors and inaccuracies appearing in the record, and the reasons why the judgment of the Commissioner should be reversed.

It was certainly not the intention of the framers of the rule that the only prerogative of an applicant's counsel was that of merely examining the record, and that thereafter he must forever hold his peace. While it may be true that an applicant on appeal is not entitled to a trial *de novo,* yet if it be granted that he has the right to have counsel after notice of appeal has been filed to examine the record, such counsel must certainly have the right to offer evidence to the Secretary of Labor showing the inaccuracies of the record upon which the excluding decision is based. What possible benefit could accrue to the applicant, or was intended by the framers of the rule to accrue to the applicant, by limiting the services of his counsel to a mere inspection of the records?

In the case of *Ex parte Lam Pui* (D. C.), 217 Fed. 456, the Court said:

> "It is true that the right to counsel secured by the Constitution amend. 6, sec. 1, relates only

to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See, too, Amend. 14. To make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceedings be called 'criminal' or 'civil' seems to be unsound. Indeed, historically, the right to counsel in civil cases and upon charges of misdemeanors antedates such right in cases of felony and treason.

Cooley, Const. Lim., p. 475:

" 'The presence, advice, and assistance of counsel' is said by Storey to be necessarily included in 'due process of law.'

Storey, on Constitution, p. 668.

"Without undertaking to say that a prisoner has an absolute right to counsel before administrative boards, not composed of lawyers, or that the denial of counsel would in every case prevent such proceedings from being fair, I am of the opinion that, under such circumstances, as are disclosed in this case, where counsel for a prisoner seasonably requests the privilege of conferring with him before the trial and of being present during the taking of the evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of

scrupulous regard for the prisoner's rights which in this case is not met.

"And while it is true that the administrative boards are, generally speaking, entitled to make their own rules of evidence, and to consider any evidence which to their minds in probative value, there are, nevertheless, certain fundamental principles which can hardly be disregarded, consistently with fair treatment to the prisoner, and which were not observed in this instance. Moreover, he had had a trial in San-Francisco, which had resulted in his favor. He was poor and under great difficulty in retrying that issue at a point 3,000 miles away. This seems to me one more circumstance which called upon the officers to be scrupulously careful and fair in their investigation.

In the case of *Hanges vs. Whitfield,* 209 Fed. 675, it was held, after calling attention to the Immigration rules of November 15, 1911, especially rule 22, and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings:

"Testimony may, no doubt, be taken in the form of affidavits, or otherwise, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration officers are credibly informed, or

have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitions or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; *but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration* in determining whether or not they should be deported.

Further the court says:

"True, the petitioners and their counsel were permitted to examine the record, or copy

> of the testimony taken by the inspector prior to the application for the warrant of arrest; but of what avail was that? That testimony had already been forwarded to the Bureau of Immigration and an inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rigths, cannot be successfully maintained."

This important decision was recently affirmed by the Circuit Court of Appeals for the Eighth Circuit (March 22, 1915), 222 Fed. 745. The Circuit Court of Appeals delivered a most instructive opinion. The court, among other things, said:

> "A full and fair hearing on the charges which threaten his deportation and an absence of all abuse of discretion and arbitrary action by the inspector, or other executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of the discretion or the arbitrary action of the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty, or is about to be deported, the power is conferred and the duty is imposed upon the courts

of the United States to issue a writ of habeas corpus and relieve him."

The Japanese Immigration Case, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721;

Chin Yow vs. U. S., 208 U. S. 8, 10, 12, 13, 28 Sup. Ct. 201, 52 L. Ed. 369;

Low Wah Suey vs. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Ex parte Petkos (D. C.), 212 Fed. 275;

U. S. vs. Chin Leu, 187 Fed. 544, C. C. A. 310.

Again the learned court states:

"Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence AT THE HEARING, AND THAT ONLY; AND THAT THE DECISION SHALL NOT BE WITHOUT SUBSTAN-

TIAL EVIDENCE TAKEN AT THE HEARING TO SUPPORT IT."

In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497;

In re Wood & Henderson, 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed., 1046;

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed., 431;

Ex parte Patkos (D. C.), 212 Fed. 275-278;

U. S. vs. Sibray (C. C.), 178 Fed. 144, 149.

Continuing, the Circuit Court of Appeals says (page 754):

"That was not a fair hearing in which the inspector after the hearing imported into the case and based his finding and recomendation of deportation on hearsay and rumors of alleged facts which there was no evidence to support, and which the accused had no notice of and no opportunity to refute at the hearings."

Interstate Commerce Co. vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431;

Ex parte Petkos (D. C.), 212 Fed. 275, 277, 278.

That an alien cannot be deported on mere suspi-

dion or anything not amounting to substantial and competent evidence is also announced in another deportation case, that of *Ex parte Lam Pui,* 217 Fed. Rep. 456. In an able opinion, District Judge Conner, said:

> "Test-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigation, with more or less success. Probably no more satisfactory definition is found for practical purposes, than that given by Mr. Edward Livingstone:
>
> " 'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.'
>
> " 'It is elementary that in judicial proceeding the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. IT IS ALSO ELEMENTARY THAT MERE SUSPICION, CONJECTURE, SPECULATION, IS NOT EVIDENCE, NEITHER CAN IT BE MADE THE BASIS FOR FINDING A FACT IN ISSUE. The industry of counsel affords a number of illustrative expressions of courts. In *People vs. Van Zile,* 143 N. Y. 372, 36 N. E. 381, Andrews, Chief Justice, says:

" 'Suspicion canot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

" 'Judge Caldwell, in *Boyd vs. Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:

" 'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing in which *petitioner has the benefit of counsel and all of his rights secured to him, the government will be able to establish the charge made against him.* I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

" 'The petitioner is entitled to be discharged from custody. An order to that effect will be drawn.' "

See also

Jonras vs. Allen, 223 Fed. 756;

Ex parte Ong King Sing, 213 Fed. 119.

In the case of *Ex parte Lam Fuk Tak,* 217 Fed.

468, 469, the Federal Court there said of a report by an Immigration Inspector inserted in the record and used against the alien.

> "At this point the inspector puts in a record. 'On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market street.'
>
> "Except for the statement inserted in the record, *not under oath,* and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*
>
> "THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED, THE FACT THAT IT IS

INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

As was stated by Judge Morton, 223 Fed. 833:

"The proceedings plainly were not of a judicial character. They cannot be supported, it seems to me, as legitimate administrative proceedings, because the officers did not endeavor themselves to ascertain the truth about the matter. *Teng Yun vs. Edsel,* supra; *U. S. vs. Sprung,* 187 Fed. 903, 907, 110, C. C. A. 37, Bouve on Aliens, p. 518. They believed that this petitioner was endeavoring to enter the United States fraudulently. They, therefore, instituted proceedings against him, endeavoring by every legal means in their power to procure his deportation. They did not act in bad faith; I do not doubt that they honestly believed the prisoner to be unlawfully here. I think, however, that the IMMIGRATION RECORDS SHOW THAT THEY WERE ENDEAVORING TO MAKE OUT A CASE, RATHER THAN TO ACT IN A FAIR OR JUDICIAL MANNER TOWARD THE ALIEN. I see no other explanation of their

refusal to allow him the assistance of counsel, their omission to notify his counsel of the taking of testimony in Pennsylvania, their uncritical acceptance and use of the testimony of Hop Lee, taken in proceedings to which this prisoner was not a party. . . . These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did, *which is the attitude of a prosecutor,* rather than of a judge, or of a fair administrative officer, in a case like the present.

"It does not seem to me that the opportunity here given to present evidence and to argue the case rendered the proceedings fair, or in accordance with due process of law. They are to be viewed as a whole, and so viewed, they present, to my mind, a plain violation of the fundamental principles of fair play by the Immigration Inspectors. I find and rule that the proceedings before them were substantially —and on account of their mistaken attitude towards the matter I think intentionally—unfair to the alien. The Acting Secretary, instead of disaffirming the illegal conduct of his subordinates, approved it and based his decision on it. In this case the petitioner belongs to a race little favored by our law. But it has been held that Immigration tribunals have

> authority to determine finally, with no appeal to the law courts or to a jury, questions of citizenship; *U. S. vs. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Tang Tun Case,* supra."

Without subdivision B of rule 5 and the expression of the eminent judges in the foregoing authorities, your appellant contends that the natural dictates of justice and fair play would grant the petitioner the right to fully and fairly present all of the facts of his appeal, either by oral argument or brief. The law affords to the appellant the right of appeal in every case where the commissioner has ruled unfavorably against the applicant, and to deprive any person seeking to enter the portals of this country the aid of counsel to properly present his appeal to the proper appellant officer would in effect deprive that person of the right of appeal. The court in its opinion said:

> "No provision of any statute and no rule of the department has been cited conferring upon the petitioner the right thus claimed, i. e. to present further evidence and orally argue the appeal."

Admitting that to be true, it is especially true that the appellee cited no statute or authorities prohibiting that right, and therefore, in the absence of such statute or rule, the spirit of fair play and justice would naturally afford him that right, notwithstanding that it might cause some inconvenience to the Commissioner General of Immigration or the acting Secretary of Labor.

The court further says the volume of business the department is necessarily called upon to transact would obviously render oral argument impossible. We contend that no amount of labor imposed upon any administrative officer or judicial officer can be made an excuse for the perpetration of an injustice. We contend that to permit counsel to orally argue the cause of his client would not in any way add to the burden of the appellate officer or retard justice, but by pointing out the errors made by the commissioner, and fully and fairly presenting the cause of his client by oral argument, would in all probability lessen the labors of the appellate officer and expedite justice, and would, no doubt, aid to reach a just conclusion. To deny any person seeking to enter the United States, as

the son of his father, the right to the aid of counsel to establish that fact, throughout all of the proceedings, would disregard every fundamental principle established in England and the United States, and would be contrary to every known principle of justice, and the next case might be an American citizen endeavoring to protect himself from exile by an administrative order made in this way.

And your appellee most respectfully and earnestly urges that this honorable court erred in its duty in failing,

1st. To consider and rule upon appellant's contention that he had not had a fair and impartial trial before the inspector in charge of immigration in Seattle, Washington, as set forth in his Amended Petition for writ of habeas corpus (p. 20 of Record).

2nd. The court further erred in that it failed, neglected or refused to consider and rule upon appellant's contention "that there is no evidence in the records to sustain the Department's Exclusion and Deportation Order, as set forth in his Amended Petition for writ of habeas corpus (p. 20 of Record).

3rd. The court erred in holding that the petitioner was without right to have counsel appear before the Commissioner General of Immigration or the lawful Secretary of Labor to orally argue the appeal.

4th. The court erred in holding that the petitioner was without right to present new evidence in support of his appeal.

5th. The court erred in conceding the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances, and failed to admit or grant, at the same time, the logical and necessary conclusions to be drawn from that concession.

6th. The court erred in holding that the approval of the Secretary of Labor, under the circumstances, quieted the issues raised.

Therefore, appellant feeling himself to have been aggrieved and injured by reason of the partial consideration accorded the issues of his cause in this court and the incomplete information made and rendered by said court therein, and believing that he has good and substantial grounds upon which to

base this petition, does hereby pray this honorable court to grant a re-hearing of the issues of said cause, to the end that said issues may be judicially quieted and justice administered.

Attorneys for Appellant.